General Motors and Chrysler Merger
by : Richard N. Sox, Jr., Esq.

First it was talk of Nissan and Chrysler merging into a single car company and now it is Chrysler and GM. In this time of domestic automakers idling factories, selling nonessential assets and reducing the dealer count, I can't quite understand why such a merger would be attractive, in particular for GM. What does Chrysler have that GM needs? From Chrysler's standpoint I suppose the plug-in electric technology is attractive. Whatever the outcome, at the speed things are moving in the auto industry these days, by the time this article is published we will probably know whether such a merger will take place or not.

If such a merger is worked out and approved by shareholders, I fear for the dealer body of both companies. If you thought there was overlap now amongst the products within GM linemakes and Chrysler linemakes, that product overlap will be magnified in a merged GM-Chrysler entity. I don't imagine it would be efficient to continue to produce a Chevy Silverado, GMC Sierra and a Dodge Ram pickup truck from different assembly lines as an example. Something is going to have to give and, as is usually the case, the dealer body will be asked (or should I say coerced) to bear the brunt of the sacrifice.

In this column, we have discussed this drill before. It is important for dealers to remember that all state franchise laws protect dealers from an improper termination of their franchise. The question becomes what is improper. In most states, a termination of a franchise is deemed improper unless the cause of the termination derives from some action or inaction of the dealer. For instance, a termination would be proper in most cases if the dealer was found to have violated a material provision of its dealer agreement (i.e. low sales performance, relocation without permission, etc.). Most state franchise laws don't contemplate the "proper" termination of a franchise simply because the manufacturer has *unilaterally* changed its business plans for the dealer's linemake. However, there is law on the books which says that the manufacturer of a product cannot be forced to continue to be responsible for providing that product to its retailers if the manufacturer is making a complete "market withdrawal." In other words, the manufacturer is not merely picking and choosing which retailers it plans to continue to provide product to but the manufacturer is instead completely withdrawing from the business of producing that product. Such a defense allows the manufacturer to avoid specific performance under the franchise agreement as well as to avoid the damage caused by the dealer's loss of the product. The market withdrawal defense does not prevent a dealer from seeking reimbursement for items such as the expense of a recent facility upgrade based on legal theories other than an illegal termination under the franchise laws.

In the Oldsmobile "discontinuance" litigation we brought against GM, our research on the issue of market withdrawal indicated that the Oldsmobile dealers had a strong argument that there was no such withdrawal because GM was still in the business of producing vehicles substantially similar to Oldsmobile vehicles through its other linemakes. We think that GM's attorneys understood this same weakness in the theory because they did not make the market withdrawal argument their main defense.

Like with Oldsmobile, we believe it would be very difficult for the post-merger GM-Chrysler entity to eliminate one or more of their linemakes and argue they are immune from liability as a result of the market withdrawal defense. By definition, eliminating overlapping product lines leaves a product line intact that is virtually identical to the produce line eliminated. We would contend that there is nothing "complete" about that type of market withdrawal. In the light duty truck example (Silverado, Sierra and Ram), the post-merger entity will still be in the business of producing a light duty truck.

Rather than be in the position of arguing over the theory of market withdrawal before a Federal judge, GM and Chrysler dealers will be in a much better position if their state franchise protections specifically address the issue of a discontinuance of an entire linemake. Some states, most recently New York, have

revised their franchise protections to expressly provide that in the case of a change in manufacturer or distributor, dealers must either receive a franchise agreement substantially the same as the prior agreement or the dealer is to receive payment of "fair market value" for their lost franchise. The fair market value is not defined in some of the older franchise laws but is expressly defined in more recently amended laws to be calculated based on a "greater of" formula using various points in time prior to the discontinuance of the linemake. Theoretically, dealers with these franchise protections will only be arguing over the *amount* of the termination benefit rather than whether the manufacturer has any liability to the dealer at all.

Ask your state and metro dealer associations if the investment you have in your franchise is protected in the situation of a merger of manufacturers. If not, contribute both your time and your money to assist the association in lobbying changes to your franchise laws. The association cannot be expected to obtain needed franchise law changes without direct dealer involvement.

A small victory against floorplan lenders

Since my column last month, entitled "Floorplan Financing Credit Crisis," the calls from dealers having their floorplan lines canceled has accelerated. These cancellations have gone from being limited to the former captive finance companies such as GMAC and Chrysler Credit to independent banks such as Wachovia and Fifth Third getting into the act. These lenders have come into dealerships demanding two things. First, they demand that no more vehicles be ordered on the floorplan line and, second, that the balance of the loans on the dealer's inventory be paid in full within some ridiculously short period of time. These demands are being made of dealers who have done nothing wrong. They are not out of trust and haven't, at least with the lender's approval, blown through their floorplan limits. Why a floorplan lender would put a dealer in a position to have a "fire sale" of his or her floorplanned vehicles is beyond understanding. The lender gets hurt just as badly as the dealer when they get 50 cents on the dollar for those vehicles and then have to chase the dealer for his or her personal guaranty to make up the difference.

We haven't found a way yet to force a floorplan institution to continue to lend money to a dealer to acquire addition inventory, but we have recently been successful in arguing before a state court judge that without a default under the floorplan financing agreement by the dealer, the lender cannot demand full payment of the balance. Instead, the lender is bound by the original payment terms of the agreement (vehicles being paid off as they are sold). Of course, this argument does not work if a dealer is truly out of trust or has committed some other express default listed in the floorplan financing agreement. But for the dealer that has been paying cars off as they are sold, we believe that the typical floorplan financing agreement does not allow the lender to simply "call" the note. Such a note is known as a demand note, which states that a lender can call the balance on the note for any reason or no reason at all. Although most floorplan financing agreements contain this type of "demand" language, such a provision is inconsistent with the inclusion of default provisions within the agreement.

Similarly, we don't believe a lender has any right to demand that the dealership maintain a certain amount of working capital with the threat of the note being called if such capital limits are not met. Unless there is a working capital requirement written into your floorplan financing agreement, such a requirement cannot be created out of thin air as a justification for demanding immediate payment of the balance of the loan. Again, however, it appears that any excuse can be used as the basis for renegotiating or terminating the floorplan note *going forward.*

The bottom line

Don't cave to your floorplan lender's demands without first consulting an experienced attorney. At the very least, involving experienced legal counsel will serve to slow the process and, in many cases, result in a "workout" plan that will give the dealer time to make other floorplan arrangements going forward

and allow the dealer time to pay the balance on the existing floorplan line.

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